BHR Group Ltd v Witech Sdn Bhd & Ors

HIGH COURT (MIRI) — SUIT NO 22–41 OF 2001 (MR)
ABDUL AZIZ ABDUL RAHIM JC
6 AUGUST 2003

Civil Procedure — Judgment — Setting aside — Failure to give notice to defendants or solicitor of intention to enter judgment under r 56 of Sarawak Advocates Ordinance (Practice and Etiquette) Rules 1988 — Whether failure to give notice under r 56 rendered judgment irregular

Legal Profession — Practice and etiquette — Professional etiquette — Failure to give notice to defendants or solicitor of intention to enter judgment — Whether failure rendered judgment irregular — Sarawak Advocates Ordinance (Practice and Etiquette) Rules 1988 r 56

This was an appeal by some of the defendants ('the defendants') against the decision of the learned deputy registrar in dismissing their application to, inter alia, set aside a judgment in default of defence ('the judgment') entered against them by the plaintiff. The defendants contended that the judgment was irregular and not made in accordance with law because the plaintiff did not give the necessary notice to the defendants or their solicitor pursuant to r 56 of the Advocates (Practice and Etiquette) Rules 1988 (Sarawak) ('the Sarawak Rules') before entering judgment.

The issue to be determined in this appeal was whether the plaintiff's failure to give notice under r 56 of the Sarawak Rules rendered the judgment irregular so as to entitle the defendants to set it aside.

Held, dismissing the appeal:

(1) Rule 56 of the Sarawak Rules could not override the Rules of the High Court 1980 ('RHC') on this matter. In this regard, O 19 r 2 of the RHC provided that where the plaintiff's claim was for a liquidated sum, as in this case, and if the defendant failed to serve a defence on the plaintiff, the plaintiff may after the expiration of the period fixed by the rules for service of defence, enter final judgment against the defendant for a sum not exceeding the sum claimed and cost. The purpose of the Rules was to regulate the conduct of the advocates and solicitors between them and the courts and amongst themselves in handling their clients' briefs or cases. The Sarawak Rules did not regulate the proceedings in the High Court, which were proceedings governed by the RHC. Therefore, non-compliance with the requirement of r 56 of the Sarawak Rules did not render a judgment obtained in default of appearance or defence an irregularity (see paras 23–25); *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33.

(2) As to the format of notice under r 56 of the Sarawak Rules, there was no prescribed form. As such, the notice could take any form, depending on the circumstances of each case, so long as it was made clear to the other side that the plaintiff or the defendant, whichever the case may be, intended to proceed with the matter regardless of the other side's plea for time (see para 38).

(3) If the defendant was trying to set aside a regularly obtained judgment, the defendant must show by affidavit evidence that he had a defence on merit. In this case, this was not done. Furthermore, until the hearing of this appeal no defence was filed by any of the defendants (see paras 44-48).

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh sebahagian defendan-defendan ('defendan-defendan') terhadap keputusan timbalan pendaftar yang bijaksana yang menolak permohonan mereka, antara lain, untuk mengetepikan penghakiman ingkar pembelaan ('penghakiman') yang dimasukkan terhadap mereka oleh plaintif. Defendan-defendan berhujah bahawa penghakiman adalah di luar aturan dan tidak dibuat menurut undang-undang kerana plaintif tindak memberi notis yang perlu kepada defendan-defendan atau peguam mereka menurut k 15 Kaedah–Kaedah Profesyen Undang–Undang (Amalan dan Etika) 1978 (Sarawak) ('Kaedah-Kaedah Sarawak') sebelum memasukkan penghakiman.

Isu yang perlu ditentukan di dalam rayuan ini adalah sama ada kegagalan plaintif untuk memberikan notis di bawah k 15 Kaedah-Kaedah Sarawak menyebabkan penghakiman tersebut adalah di luar aturan dan defendan-defendan berhak untuk mengetepikannya.

Diputuskan, menolak rayuan tersebut:

(1) Kaedah 56 Kaedah-Kaedah Sarawak tidak boleh mengatasi Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') di dalam perkara ini. Berkaitan perkara ini, A 19 k 2 KMT memperuntukkan bahawa jika tuntutan plaintif hanyalah untuk tuntutan jumlah tertentu, seperti di dalam kes ini, dan sekiranya defendan gagal menyampaikan pembelaan kepada plaintif, plaintif boleh selepas tamatnya tempoh yang ditetapkan oleh kaedah-kaedah bagi penyampaian pembelaan itu, memasukkan penghakiman muktamad terhadap defendan untuk sejumlah wang yang tidak melebihi jumlah wang yang dituntut berserta kos. Tujuan Kaedah-Kaedah ini adalah untuk mengawalselia tingkahlaku peguambela dan peguam cara di antara mereka dan mahkamah dan sesama mereka di dalam mengendalikan arahan-arahan dan kes-kes klien mereka. Kaedah-Kaedah Sarawak tidak mengawalselia prosiding di Mahkamah Tinggi, di mana prosiding itu dikawal oleh KMT. Oleh itu, ketidakpatuhan kepada

keperluan k 56 Kaedah-Kaedah Sarawak tidak menjadikan penghakiman yang didapatkan oleh kerana ingkar kehadiran atau pembelaan adalah di luar aturan (lihat perenggan 23–25); *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33.

(2) Tidak ada borang yang ditetapkan berkenaan dengan format notis di bawah k 56 Kaedah-Kaedah Sarawak. Oleh itu, notis tersebut boleh mengambilkira sebarang bentuk, bergantung pada keadaan setiap kes, selagi ianya dijelaskan kepada pihak yang lain bahawa plaintif atau defendan, mana-mana kes yang berkenaan, mahu meneruskan perkara itu tidak kira ada permintaan pihak lain untuk masa (lihat perenggan 38).

(3) Sekiranya defendan cuba untuk mengetepikan suatu penghakiman yang diperolehi secara teratur, defendan mestilah menunjukkan melalui afidavit keterangan bahawa dia mempunyai merit di dalam pembelaannya. Di dalam kes ini, perkara ini tidak dibuat. Selanjutnya, sehingga pendengaran rayuan ini, tiada pembelaan yang difailkan oleh mana-mana defendan (lihat perenggan 44-48).

Notes

For cases on setting aside a judgment, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 3526
For cases on practice and etiquette of the legal profession, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) 1719, 1866
For setting aside a judgment, see 1 *Halsbury's Laws of Malaysia*, paras [10.6-046]

Cases referred to

Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors [1988] 1 MLJ 33 (folld)
B Dialdas & Co Pte Ltd v Sin Sin & Co [1984] 2 MLJ 223 (refd)
Bank Bumiputra Malaysia Bhd v Majlis Amanah Rakyat [1979] 1 MLJ 23 (refd)
Evans v Bartlam [1937] AC 473 (refd)
Hasbullah Chan & Associates Architect v Rahika Development Sdn Bhd [2000] 4 MLJ 289 (refd)
Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd [1986] 1 MLJ 348 (refd)
Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors [1998] 1 MLJ 607 (refd)
Vijendran Poniah v MBf Country Homes & Resorts Sdn Bhd & Anor [2002] 1 MLJ 535 (refd)
Wan Mohd Sofian bin Wan Md Saad v MBf Finance Bhd [2000] 5 MLJ 519 (refd)

Legislation referred to

Legal Profession Act 1976 s 77
Legal Profession (Practice and Etiquette) Rules 1978 r 56
Rules of the High Court 1980 O 19 r 2, r 9
Sarawak Advocates Ordinance (Practice and Etiquette) Rules 1988 r 56

Bong Ah Loi (Bong & Co) for the plaintiff.
Ma Seong Yuin (Kadir, Wong, Lin & Co) for the 11th defendant.
Tai Choi Yu (Tai Choi Yu & Co) for the first, second, fourth, sixth, seventh, eighth, 10th, 13th, 15th, 18th, 19th and 20th defendants.

Abdul Aziz Abdul Rahim JC:

[1] This is an appeal by the first, sixth, seventh, eighth, 13th, 19th and 20th defendants (collectively 'the defendants') against the decision of the learned deputy registrar given on 8 November 2001 dismissing the defendants application by summons-in-chambers (encl 79) to set aside a judgment in default ('JID') of defence entered by the plaintiff against the defendants and also for a stay of all proceedings pending the final disposal of encl 79.

[2] The defendants application in encl 79 was supported by an affidavit of one Tai Choi Yu, the defendants' advocate ('Tai's affidavit').

[3] The defendants alleged in paragraph five of Tai's affidavit that the JID entered against the defendants was irregular and not made in accordance with law. The defendants contended that this was so because the plaintiff did not give necessary notice to the defendants or their solicitor before entering the JID. In particular the defendants contended that no notice was given pursuant to r 56 of the Sarawak Rules. This was the sole ground on which the defendants grounded his appeal against the deputy registrar decision.

[4] Rule 56 of Sarawak Rules provides as follows:

> Where the name of the advocate or his firm appears on the court record or the fact of representation is known to the other side, no advocate representing the other party to the shall enter judgment by default against the client of the first-named advocate or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying any order in the proceedings by such first-named, unless he shall have given to such first-named written notice of his intention to do so, and forty-eight hours shall have elapsed after the delivery of such notice to the first-named advocate.

[5] Learned counsel for the defendants submitted that the failure of the plaintiff's advocate to give notice to the defendants' advocate of the intention to enter JID, pursuant to r 56 of the Rules had denied the defendants the right to be heard, hence rendering the JID obtained as irregular and not in accordance with law.

[6] Counsel for the defendant cited *Wan Mohd Sofian bin Wan Md Saad v MBf Finance Bhd* [2000] 5 MLJ 519 to support his contention.

[7] In that case the court had to consider, as one of the issues, whether the plaintiff's solicitor's non-compliance with r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 was a factor that should have been considered by

the court. It is to be noted that r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 is in pari materia with r 56 of the Sarawak Rules. It is also pertinent to note that in *Wan Mohd Sofian's* case the plaintiff had entered judgment against the defendant and the court find as a matter of fact that there is no evidence of any notice being given to the defendant solicitor of the plaintiff's intention to do so. On r 56 of the Legal Profession (Practice and Etiquette) Rules 1978, His Lordship Kamalanathan Ratnam J in *Wan Mohd Soffian* at p 324 said:

> Clearly the plaintiff ought to have given the defendant such notice. There is no evidence before me of any such notice being given at all. The legal profession in Malaysia is governed by the Legal Profession (Practice and Etiquette) Rules 1978 and the Legal Profession Act 1976 (the Act). Various subsidiary legislation in the form of rules have been gazetted under the rules-making powers contained in the said Act. The object of these rules is to ensure that advocates and solicitors conduct their affairs in an honourable and fair manner befitting the practice of law. Therefore in an application to set aside a judgment obtained in breach of any of the said rules or the provisions of the Act the court ought to consider such a breach.

[8] Learned counsel for defendant also cited the High Court case of *Hasbullah Chan & Associates Architect v Rahika Development Sdn Bhd* [2000] 4 MLJ 289. In that case, the plaintiff entered judgment in default of defence 11 months after the defendant had filed the memorandum of appearance and this was done without giving any notice of intention to enter judgment to the defendant a move contrary to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 which was made pursuant to s 77 of the Legal Profession Act 1976.

[9] As regard to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978, His Lordship Abdul Malik Ishak J said at p 298 of the report:

> … by necessary implication imports the audi alteram partem rule and clearly therefore, in facts, the plaintiff has breached the rule of natural justice by not adhering to r 56 thereof, A plaintiff in reading of r 56 clearly shows that the parties to an action must conduct theirs affairs in a fair orderly manner adhering strictly to the rule of natural justice.

[10] Then at p 300 His Lordship said:

> Reverting back to r 56 of the Legal Profession (Practice and Etiquette) Rules 1978. I have this to say. It has the force of law and its breach must be considered in the light of an application to set aside a judgment-in-default of defence (compare the decision of *Asia Commercial Finance (M) Berhad v Bank Bumiputra Malaysia Berhad & Ors* [1988] 1 MLJ 33 with that of *Wan Mohd Sofian bin Wan Md Saad v MBf Finance Bhd* [2000] 5 MLJ 519).

[11] It can be seen from the two cases cited by the learned counsel for the defendants, a breach of r 56 of the Legal Profession (Practice and Etiquette) Rules 1978, which is in pari materia with r 56 of the Sarawak Rules, will be taken into consideration by the court in exercising its discretion whether or

not to set aside a judgment in default. However in those two cases there was no evidence at all as to notice being given to the other counsel before the judgment in default was entered. Also to be noted is that the cases do not decide in what form the notice should take.

[12] The learned counsel for defendants also cited the case of *Vijendran Poniah v MBf Country Homes & Resorts Sdn Bhd & Anor* [2002] 1 MLJ 535. In that case the first defendant entered judgment in default of appearance against the plaintiff without having served the summons on the plaintiff and without giving any notice under r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 to the plaintiff's solicitor despite the fact that the plaintiff was represented by solicitors was known to the first defendant's solicitor. However in *Vijendran's* case the learned trial judge, His Lordship Kamalanathan Ratnam J, did not make much of the failure to serve the notice under r 56 of the Legal Profession (Practice and Etiquette) Rules 1978. In my view this is because the learned judge found that there are more serious acts on the part of the defendant in that case that rendered the judgment in default obtained as irregular. At p 550 of the report, when awarding aggravated damaged to the plaintiff the learned judge said:

> Every action and step taken by the defendants from the beginning was dishonest, malicious and totally reckless.

[13] It is trite that the court would set aside a judgment in default if it is found to be irregular. But if the judgment in default is a regular judgment the court would be slow to set it aside unless the defendant could show that he has a good defence on merits.

[14] Under O 19 r 2, where the plaintiff claim is for a liquidated sum, as in this case, if the defendant fails to serve a defence on the plaintiff, the plaintiff may after the expiration of the period fixed by the rules for service of defence, enter final judgment against the defendant for a sum not exceeding the sum claimed and cost.

[15] Order 19 r 9 gives the court discretion to set aside or vary any judgment entered in default as a result of procedural non-compliance.

[16] In *Evans v Bartlam* [1937] A C 473, at p 480 Lord Atkin said:

> The principle obviously is that unless and until the court has pronounced a judgment on the merit or by consent, it is to have the power to evoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedures.

[17] The principle in *Evans* has been followed in Malaysia (see Malaysian High Court Practice – High Court Malayan Law Journal 1998 at p 539).

[18] In *Evans* there is also a passage at p 480 by Lord Atkin which reads: **A**

> The court's however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits meaning that applicant must produce to the court evidence that he has prime facie defence.

B

[19] Again, this principle has been approved in a Federal Court case of *Bank Bumiputra Malaysia Bhd v Majlis Amanah Rakyat* [1979] 1 MLJ 23 where at p 24 the Federal Court said:

> Its axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is an affidavit statutory facts showing a defence on the merits. **C**

[20] So, the proposition in this case is that the defendants may apply to set aside the JID if it can be shown that it is irregularly obtained and that the defendants have a defence on merits which the defendants must show in an affidavit supporting the application to set aside the JID. **D**

[21] The question before me, therefore is whether the failure to give notice under r 56 of the Sarawak Rules renders the JID obtained by the plaintiff in this case irregular so as to entitle the defendants to set it aside.

[22] The secondary question is that if notice is given what is the form of notice and what constitute a proper notice. **E**

[23] On the first question it is to be noted that in the cases cited by the learned counsel for the defendants, nothing was said that non-compliance with r 56 of the Sarawak Rules rendered the JID in those cases irregular. All those cases said was that it has to be taken into consideration. I do not accept that r 56 of the Sarawak Rules can override or has greater force than the Rules of the High Court on this matter. The purpose of the rules on practice and etiquette is to regulate the conducts of advocates and solicitors between them and the court and amongst themselves in handling their clients briefs or cases. Those rules do not regulate the proceedings in the High Court which is governed by the High Court Rules 1980. Assuming for a moment that in a given case the plaintiff has filed a summons against the defendant and the summons was properly served on the defendant solicitor. The defendant solicitor did not enter any defence within the period specified under the rules of court; would not the plaintiff solicitor be entitled under the rules to apply for final judgment against defendant? It must be remember that the rules of the court apply equally to the plaintiff and the defendant. The defendant ought to have known and in fact is expected to know the risk of not entering appearance or defence within the period specified under the rules. It is only a matter of courtesy and good etiquette between solicitors that notice is required to be given to the other of the intention to enter JID. The rule is not meant to excuse complacency or sloppiness on the part of the practitioner. **F** **G** **H** **I**

[24] In *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33 the High Court said at p 33 that:

> It is not in dispute that the Practice and Etiquette Rules have the force of law. The Rules were made by the Bar Council in pursuance of the powers conferred upon it by s 77 of the Legal Profession Act 1976. In *Re S Fung, A Solicitor* [1941] MLJ 173, the court held that the Rules regulating the practice and etiquette of the Singapore Bar which had been made under s 31(l)(a) of the Advocates and Solicitors Ordinance had the force of law.
>
> The question to be considered here is whether non-compliance with r 56 renders the judgment obtained in default of defence an irregular judgment.
>
> The Practice and Etiquette Rules, 1978 were made by the Bar Council for the purpose of 'regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors' (see s 77(1) of the Legal Profession Act). Sub-section (3) of s 77 of the Act states that any advocate and solicitor who fails to comply with the said Rules may be liable for disciplinary proceedings.
>
> …
>
> In my opinion, the Practice and Etiquette Rules, 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of legal proceedings in the High Court. Indeed, the Bar Council has no power under the Legal Profession Act to make rules to regulate procedure of legal proceedings.
>
> The rules regulating and prescribing the procedure and practice to be followed by the High Court are found in the Rules of the High Court 1980. These rules were made by the Rules Committee under powers conferred upon it by s 17 of the Courts of Judicature Act 1964. O 1 r 2(1) of the Rules of the High Court explicitly states that 'these rules shall have effect in relation to all proceedings in the High Court...'
>
> It is clear, therefore, that non-compliance with r 56 of the Practice and Etiquette Rules, 1978 does not render the judgment in default of defence, as in the instant case, irregular. Under O 2 r 1 of the Rules of the High Court, only failure to comply with the Rules of the High Court shall be treated as an irregularity. In other words judgment in default of defence is only an irregular judgment if the plaintiff, in obtaining the judgment, failed to comply with the Rules of the High Court.

[25] I agree with conclusion of the learned judge in *Asia Commercial Finance* above that the legal proceedings before the High Court is not regulated by the Legal Profession (Practice and Etiquette) Rules 1978, for Semenanjung or Advocates (Practice and Etiquette) Rules 1988 for Sarawak. The proceedings before the High Court are regulated by the High Court Rules 1980 made by the Rules Committee under the provision of Courts of Judicature Act 1964. In my view therefore non-compliance with the requirement of r 56 Practice and Etiquette Rules does not render a judgment obtained in default of appearance or defence an irregularity.

[26] It is also to be noted in that in all the cases cited by the learned counsel for the defendants to support his contention, it was an undisputed fact that no notice under r 56 was given at all. On this point the instant case can be distinguished. The affidavit in opposition affirmed by one Merlyn Toh Ah Mei ('Toh's affidavit') on 21 November 2001 and filed by the plaintiff to oppose the defendants application in encl 79, clearly show, through exhibit MT1 to the affidavit, that the learned counsel for the defendants wrote a letter dated 21 June 2001 to the counsel for plaintiff stating as follows:

> We refer to the above captioned suit.
>
> Please be advised that we so far been instructed to act for the first, seventh and eighth defendant and we are trying to establish and finalise all the defendants that we shall be representing here in so that we can file in the Memorandum of Appearance and/or Defence expeditiously instead of piece-meal.
>
> Please contact us if you have any enquiries on our said representation and refrain from further action on the same until you hear from us again.

[27] At this point it is pertinent to note that from the court's records and file the writ of summons and the statement of claim by the plaintiff were filed on 11 May 2001. They were duly served on the respective defendants (see affidavits of service by Ahmad Zaini bin Zaidini, encl 14, encl 8, encl 44 and encl 90).

[28] The writ was not served on the third, 14th and 16th defendant (see affidavit of non-service encl 91).

[29] Appearance was entered by the first, seventh and eighth defendant on 23 June 2001 (encl 6). Appearance by the sixth and 20th defendant was entered on 5 July 2001 (encl 10). Appearance by 17th was entered on 18 July 2001 (encl 16). Appearance by 19th defendant was entered on 30 July 2001 (encl 23). Appearance by 5th defendant was entered on 4 September 2001 (encl 48). Appearance by the second, fourth, tenth, 13th, 15th and 18th defendant were entered on 9 October 2001 (encl 57).

[30] It can be seen therefore that the writ of summons and the claim were served on the first, sixth, seventh, eighth, 13th 19th and 20th defendant. Their counsels entered appearance for them except for the 13th and 21st defendant who did not enter any appearance.

[31] It is also to be noted from the court record and file that beside fifth, 11th and 17th defendant no other defendant has filed any defence.

[32] Now, in response to the learned counsel for the defendant's letter of 21 June 2001, as quoted above, the learned counsel for plaintiff wrote a letter in reply on 22 June 2001 in the following terms:

A We refer to the above captioned matter and your letter dated 21 June 2001.

We regret to inform you that we have instruction from our client not to grant you or any defendants any indulgence not to proceed further. Our instruction is to act expeditiously unless your client file and serve their Memorandum of Appearance within the prescribed period.

B

Please treat this letter as the necessary notice.

[33] This exchange of letters between the counsels for the plaintiff and the defendants clearly shows that the plaintiff was adamant not to grant any extension of time to the defendants. The letter from the learned counsel for
C the plaintiff stated in no uncertain terms that they were under instruction to act expeditiously in the matter and even drew the attention of the defendants counsel to treat the letter on the necessary notice.

[34] I am fully aware that in the plaintiff's counsel letter to the learned counsel
D for defendants, no reference was made to the filing of statement of defence. The said letter only refer to 'our instruction is to act expeditiously unless your clients file and served their Memorandum of Appearance within the prescribed period'. I also noted that the JID was entered against defendant first, seventh and eighth on 23 July 2001, after the defendants have entered their appearances. On 23 June 2001 JID against sixth and 20th defendants were obtained on
E 23 July 2001 and 8 August 2001 respectively after they filed the appearance on 5 July 2001. JID against second, fourth, 10th, 15th and 18th defendants were entered on 13 November 2001 after they have entered appearance on 9 October 2001. JID against 19th and 21st defendants was entered on 22 August 2001 after defendant 19th had entered appearance on 30 July 2001. The 21st defendant
F did not entered any appearance at all.

[35] From the chronology of events above, it can be seen that, except for the 21st defendant, the other defendants relevant to this appeal, had ample time to file their defence. But they did not do so. It is an undisputed fact even at the time of hearing of this appeal before me, they have not filed their defence.

G

[36] Thus in my view, even though the letter in reply by the learned counsel for plaintiff to the defence counsel's letter dated 21 June 2001 requesting for time (it is implicit any way even though it did not state so expressly) did not make any reference to the filing of the defence, it does not in any way deprived
H the plaintiff of his right under the rules to apply for JID against the defendants in default of defence.

[37] It is also to be noted that the learned counsel for defendants is an experienced advocate and it should have dawned on him that when the plaintiff's counsel stated in the letter that his instruction was to act expeditiously
I and that the defendant was to treat the letter same as a necessary notice, it is to be expected that the plaintiff's counsel would take every possible course of actions available under rule to expeditiously deal with the matter in order to

obtain judgment for his client's claim. Under these circumstances I conclude that JID entered into by the plaintiff in this case is a regular judgment.

[38] As to the format of notice under r 56 of the Practice and Etiquette Rules, there is no specific form of notice being prescribed by the High Court Rules 1980 or the Legal Profession Act 1976 or the Sarawak Advocates Ordinance. Therefore the notice could take any form, depending on the circumstances of each case, so long as it is made clear to the other side that the plaintiff or the defendant as the case maybe, intend to proceed with the matter regardless of the other side plea for time. In my view the letter of 22 June 2003 by the plaintiff counsel to the defendant counsel in this instant case constitute a sufficient notice to comply with the requirement of r 56 of Sarawak Rules.

[39] As to the merit of the defence, there was none. The plaintiff's claim against the defendants was grounded on a breach of fiduciary duty under a contract of agency and constructive trust. The plaintiff is a company incorporated in United Kingdom and has its registered address in United Kingdom. The first defendant is a Malaysian registered company and having address in Miri Sarawak. Second, third, fourth, fifth and sixth defendants were at the material times director of the first defendant. The seventh defendant is a business development co-ordinator of the first defendants and the principal person in charge of the first defendant operations in Miri, The eighth defendant was at the material time the authorised signatory of the first defendants current account No 36091-3500042-3-000 with Sime Bank Bhd (now RHB Bank Berhad) Miri. By a series of letters exchanged between the plaintiff and first defendant between July 1997 and March 1998, through the seventh defendant, the plaintiff appointed the first defendant as their sale agent for the plaintiff's business in Malaysia. The first defendant was promised by the plaintiff a commission of 7.5% of the selling price for the business secured.

[40] In early July 1988, Sarawak Shell Sdn Bhd awarded the plaintiff, through first defendant, the contract to design, manufacture, supply and performance guarantee of one unit of Liquid Gas Eductor valued at British £54,825.00. On 15 December 1998 the plaintiff delivered the Liquid Gas Eductor to the Shell Sdn Bhd and the later confirmed to the plaintiff that they (i.e. Sarawak Shell) had made payment of RM357,315.60 (equivalent of £54,825.00 then) to first defendant and this said sum was paid to first defendant current account in trust for the plaintiff.

[41] Despite several demands by the plaintiff, it was alleged that the first defendant, in breach of its fiduciary duty under the contract of agency has failed or refused to remit the sum of RM328,548.00 (equivalent to £52,250.00 after deducting the commission of 7.5% of the selling price).

[42] It was also alleged in para 13 of the plaintiff statement of claim that the two cheques issued by the first defendant that is Sime Bank cheque No 049687

dated 5 September 1999 and Bumiputra Commerce Bank Bhd cheque No 0585079 were returned by the plaintiff's banker in England with a 'stop payment' instruction from the first defendant. It was alleged in paragraph 13(v) of the statement of claim that the first defendant by a letter dated 3 July 2000 admitted to the plaintiff that the first defendant is now penniless and unable to account to the plaintiff for the payment received on behalf of the plaintiff. In para 14 of the statement of claim it was claimed that first, second, third, fourth, fifth, sixth, seventh and eighth defendants knowingly withdrew on the account they received on behalf of the plaintiff and converted them to their own use by dismissing and issuing cheques on the current account in which the money was paid into and purportedly to be held in trust for the plaintiff in favour of third parties and stranger, comprising of ninth to 21st defendants, the particulars of which were given in that paragraph of the statement of claim.

[43] In his affidavits affirmed on 7 November 2001 in support of the defendant's application in encl 79 to set aside the JID, Tai Choi Yu, of counsel to the defendants in this appeal did not disclose any tenable or reasonable grounds of defence on merits to the above allegations except that to say in paragraph five of his affidavit that the plaintiff had fail to give notice to his counsel for the defendants before ensuing the JID.

[44] I have said earlier, and I also referred to some authorities, that if a defendant is trying to set aside a regularly obtained judgment, defendant must show by affidavit evidence that he has a defence on merit. In this case this was not done. Furthermore, until the hearing of this appeal no defence was filed by any of the defendants in this appeal.

[45] In *B Dialdas & Co Pte Ltd v Sin Sin & Co* [1984] 2 MLJ 223, it was held that:

> The court's discretion under the rule must however be exercised in accordance with the settled principle that if the judgment is a regular judgment, then it is almost inflexible rule that there must be an affidavit showing a defence on the merit.

[46] In *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348, in dismissing the appeal of the appellant in setting aside the judgment in default, his Lordship Edgar Joseph Jr J (as he then was) held that what was crucial in an application of this sort is whether there was evidence before the Court disclosing a prima facie defence to the plaintiff's claim for possession or in other words, a defence on the merits.

[47] In *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607, the Court of Appeal held that:

> The court would assume that the contents of the statement of claim to be true in the absence of defence being filed by the respondents...

The facts as stated in the statement of claim clearly showed the unconscionable or unmeritorious conduct of the respondents. At least those facts were, in the absence of any defence filed, assumed true, and stood unrebutted and would constitute a good cause of action against the respondents.

[48] Perusal of Tai's affidavit in support of the defendants' application, shows that there is not an iota of evidence showing a prima facie defence on the merits other than the allegation of non-compliance with rule or direction or provision or regulation as set out in para 5 of Tai's affidavit. Further, up to this very point, the defendants for reasons unknown have not even filed their statement of defence.

[49] For the foregoing reasons I dismiss this appeal with cost to the plaintiff.

Appeal dismissed.

Reported by Lim Lee Na